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BEFORE THE  
Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

WASHINGTON, D. C.

In the Matter of )  
 )  
Petition for Rulemaking to ) RM  
Adopt a Uniform Definition of )  
Facilities-Based Carrier )

DOCKET FILE COPY ORIGINAL

TO: The Commission

PETITION FOR RULEMAKING

IDB Communications Group, Inc. ("IDB"),<sup>1</sup> by its attorneys and pursuant to 47 C.F.R. § 1.401, hereby petitions the Commission to initiate a rulemaking to adopt a uniform definition of facilities-based carrier for purposes of the Commission's rules and policies governing international common carriers.<sup>2</sup>

I. THE DEFINITION OF A FACILITIES-BASED CARRIER HAS IMPORTANT POLICY AND PRACTICAL CONSEQUENCES

The definition of a facilities-based carrier is becoming increasingly central to the Commission's international regulatory regime. Significantly, the Commission's international private line ("IPL") resale policy applies only to resale carriers, not to

<sup>1</sup> IDB is a leading U.S. supplier of domestic and international telecommunications services, including radio and television program distribution, private line services, mobile satellite services, and international message telephone service. IDB purchased World Communications, Inc. ("WorldCom") from TeleColumbus U.S.A., Inc. in December, 1992.

<sup>2</sup> The instant petition does not extend to the Commission's rules and policies governing domestic common carrier services. In addition, this petition is limited to defining a facilities-based international common carrier. Entities which do not qualify as facilities-based carriers do not necessarily qualify as resale common carriers. IDB is not proposing any change in the Commission's well-established definition of resale. E.g., MCI Telecommunications Corp. v. AT&T, 7 FCC Rcd 5096, 5097 (1992).

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facilities-based carriers.<sup>3</sup> That policy provides that U.S. carriers may not provide switched services through the resale of IPLs unless the foreign country provides "equivalent" opportunities to U.S. carriers. To date the Commission has found only Canada to be an "equivalent" country,<sup>4</sup> and at most a handful of other countries (e.g., the U.K., Sweden, Australia and New Zealand) are potential "equivalent" countries under the Commission's criteria.<sup>5</sup> Therefore, the Commission's definition of facilities-based carrier is crucial in determining what kind of services, if any, U.S. carriers can provide to the vast majority of foreign countries.

The Commission's IPL resale policy has already caused disputes regarding the definition of a facilities-based carrier. On December 21, 1992, AT&T filed an informal complaint (IC-93-02151) against WorldCom and two foreign entities for allegedly reselling IPLs in violation of the Commission's policy. Last month AT&T incorporated its allegations into a formal complaint

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<sup>3</sup> Regulation of International Accounting Rates, 7 FCC Rcd 559 (1992).

<sup>4</sup> See Fonorola Corporation and EMI Communications Corporation, 7 FCC Rcd 7312 (1992). AT&T's petition for reconsideration in that proceeding is pending.

<sup>5</sup> Several entities have filed Section 214 applications asking the Commission to declare the U.K. an "equivalent" country. E.g., "Application," filed on Nov. 19, 1993 by ACC Global Corp., ITC-93-035. Cable and Wireless, Inc. filed a Section 214 application (ITC-93-328) on September 9, 1993 asking the Commission to find, inter alia, that Australia and Sweden are "equivalent" countries. Other Section 214 applications are pending for authority to resell IPLs between the U.S. and Canada. E.g., "Application," filed on August 16, 1993 by LDDS Communications, Inc., ITC-93-321.

against the parties under Section 208 of the Communications Act. All three parties have strongly denied engaging in any prohibited activities.<sup>6</sup> One of several legal issues raised by AT&T's complaints is whether the defendants were facilities-based or resale carriers. A rulemaking would obviate such disputes in the future and prevent existing disputes from having a "chilling" effect on the ability of U.S. carriers to continue developing competitive services in the international telecommunications market.

The definition of a facilities-based carrier also has practical consequences. The Commission issued a Notice of Proposed Rulemaking in CC Docket No. 93-157 on July 2, 1993 (FCC 93-291) to codify a modified requirement for filing international circuit status reports. The Commission's proposed rule would apply only to facilities-based carriers, not to resale carriers. Moreover, the Commission imposes different reporting requirements upon facilities-based and resale carriers for international traffic and revenue data.<sup>7</sup> As a result, U.S. international carriers must be able to understand whether they are classified as a facilities-based carrier in order to comply with the Commission's reporting requirements.

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<sup>6</sup> See Letter to K. Kneff, FCC, from R. Koppel, IDB (Mar. 24, 1993 (IC-93-02151) [hereinafter "Kneff Letter"]; Letter to K. Kneff, FCC, from G. Staple, Koteen & Naftalin (Mar. 24, 1993).

<sup>7</sup> See "Manual for Filing Section 43.61 Data," FCC Report 43.61 (July 1992) [hereinafter "FCC Manual"].

## II. THE DEFINITION OF A FACILITIES-BASED INTERNATIONAL CARRIER IS BECOMING BLURRED

Historically, the Commission has defined facilities-based international carriers to be "carriers [which] own or lease international telecommunications facilities in order to provide international service."<sup>8</sup> Put in other words, "[a] facilities-based carrier may own or lease international channels."<sup>9</sup> In its recent reconsideration decision on the IPL resale policy, the Commission saw the need to clarify that the policy does not apply to facilities-based carriers.<sup>10</sup> It stated that carriers which obtain capacity from separate satellite systems or private undersea cables, whether through "sale or lease," are facilities-based carriers. The Commission also clarified that U.S. carriers which lease facilities from Comsat are facilities-based carriers.

The Commission often has regulated U.S. international carriers which lease circuits in U.S. or foreign cables as facilities-based carriers. The Commission adopted 47 C.F.R. § 63.10(b) to require non-dominant carriers to file semi-annual circuit addition reports, and the Commission made clear that this provision applied solely to facilities-based carriers.<sup>11</sup> By

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<sup>8</sup> See FCC Manual at 4.

<sup>9</sup> Id. at 12.

<sup>10</sup> See Regulation of International Accounting Rates, 7 FCC Rcd 7927, 7931 (1992).

<sup>11</sup> E.g., "Requirement that Non-Dominant International Carriers File Semi-Annual Circuit Addition Reports (Section 63.10(b))," Report No. I-6421, 1990 Lexis 440 (Jan. 31, 1990); Adams Telegraph Company, 4 FCC Rcd 1646, 1647 n.6 (1989).

imposing this reporting requirement upon numerous U.S. carriers leasing U.S. or foreign international circuits,<sup>12</sup> the Commission necessarily regulated such carriers as facilities-based carriers, not resale carriers.

Recent actions by the Commission, however, have created some confusion regarding the definition of a facilities-based carrier. For example, in a few instances the Commission has classified carriers which lease the underlying transmission facilities as resale carriers, but nevertheless subjected such carriers to Section 63.10(b) even though that provision was designed only for facilities-based carriers.<sup>13</sup> The Commission did not explain its departure from past practice.

Similarly, in CC Docket No. 93-157, the Commission proposed to define facilities-based carriers (at ¶ 2 n.2) as "those international common carriers which acquire international transmission facilities on an ownership or indefeasible right of use [IRU] basis or lease satellite capacity from Comsat or a separate satellite system." Although this definition varies from the Commission's past practice, the Commission did not explain such variations.

In its comments in CC Docket No. 93-157, IDB noted that the Commission's proposed definition would "create[] arbitrary

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<sup>12</sup> See Comments of IDB Communications Group, Inc., CC Docket No. 93-157, filed Sept. 1, 1993, at 3-4 [hereinafter "IDB Comments"]; Kneff Letter at pages 3-7 & n.2.

<sup>13</sup> See LDDS Communications, Inc., 8 FCC Rcd 924 (1993); Fonorola Corporation and EMI Communications Corporation, 7 FCC Rcd 7312 (1992).

distinctions between facilities-based and non-facilities based carriers."<sup>14</sup> In particular, IDB questioned why the Commission would regulate carriers which lease facilities from Comsat or non-common carrier systems as facilities-based carriers, while carriers which lease facilities in common carrier undersea cable systems would be regarded as resale carriers. No other commenting party addressed these issues.

AT&T has sought to exploit the confusion as to the proper definition of a facilities-based carrier. In CC Docket No. 93-157, AT&T filed reply comments urging the Commission to defer resolving the question of which carriers qualify, and do not qualify, as facilities-based carriers. Instead, AT&T urged the Commission to adopt its proposed definition for use "only in the context of identifying which carriers are required to file Circuit Status Reports."<sup>15</sup> However, only one week earlier, AT&T engaged in ex parte meetings with Commission staff where it urged the Commission to find WorldCom's foreign correspondents to be facilities-based carriers because they "do not meet the definition of facilities-based carriers in the FCC's recent NPRM on the Filing of International Circuit Status Reports, i.e., carriers which acquire international transmission facilities on an ownership or IRU basis or lease satellite capacity."<sup>16</sup> AT&T also

<sup>14</sup> IDB Comments at 1-2.

<sup>15</sup> See "Reply Comments of AT&T," CC Docket No. 93-157, filed Oct. 1, 1993, at 4.

<sup>16</sup> See AT&T Ex Parte Filing, IC-93-02151, Sept. 24, 1993, at page 3 (emphasis in original).

relied upon the proposed new definition in its formal complaint against WorldCom and two other entities. AT&T is trying to play both ends against the middle. The Commission should discourage such activities by commencing a rulemaking proceeding to adopt a uniform definition of facilities-based carrier.

III. THE COMMISSION SHOULD ADOPT A UNIFORM  
DEFINITION OF FACILITIES-BASED CARRIER

As IDB has previously advised the Commission, it fully accepts the Commission's historic definition of facilities-based carrier to include carriers which lease the underlying transmission capacity.<sup>17</sup> Under that definition, for example, a carrier which leases capacity from a common carrier undersea cable system operator would qualify as a facilities-based carrier. IDB believes that this definition has worked well in the past and constitutes a workable mechanism for distinguishing between facilities-based and resale international carriers in the future.

At the same time, IDB acknowledges the Commission's apparent desire to construct a definition which results in a narrower class of facilities-based carriers. IDB does not oppose that objective, but strongly believes that the Commission must adopt a definition which avoids arbitrary and discriminatory distinctions between otherwise similarly-situated carriers. In particular, the Commission should not make ownership of the underlying facilities a prerequisite for qualifying as a facilities-based carrier in situations where carriers are not

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<sup>17</sup> IDB Comments at 5.

permitted by law to acquire an ownership interest. Rather, the Commission should adopt a uniform definition which permits international carriers to qualify as facilities-based carriers when they are foreclosed by law from obtaining an ownership interest in the underlying transmission capacity.

IV. CARRIERS OBTAINING THE MAXIMUM INTEREST IN  
INTERNATIONAL FACILITIES PERMITTED BY LAW SHOULD  
BE CLASSIFIED AS FACILITIES-BASED CARRIERS

IDB proposes that the Commission regulate an international common carrier as a facilities-based carrier when it obtains the maximum interest in the underlying facility permitted by law. To that end, IDB proposes that the Commission amend its rules by adding the following provision:

§ 63.11 Definition of facilities-based  
international communications service provider.

For purposes of the Commission's policies and rules applicable to international communications service providers, any such provider which has an ownership interest in the facilities or capacity used to provide international communications service, or which obtains the maximum interest permitted by law in such facilities or capacity from an entity with an ownership interest, shall be deemed a facilities-based international communications service provider.

Such a definition would establish a clear demarcation between facilities-based and non-facilities based carriers, and would treat all carriers fairly and without discrimination because each carrier would have the opportunity to qualify as a facilities-based carrier should it so desire. Particularly with the increasing availability of transmission capacity on a competitive basis, and as it becomes less burdensome for small carriers to



acquire an ownership interest in the facility, this definition establishes a reasonable delineation of the category of facilities-based carriers.<sup>18</sup>

Under the "maximum interest" definition, carriers which lease capacity directly from Comsat should be regulated as facilities-based carriers because only Comsat may own the INTELSAT space segment. Similarly, to the extent the Commission seeks to exercise jurisdiction over carriers providing the foreign half-circuit,<sup>19</sup> the Commission should regulate such carriers as facilities-based carriers when they directly lease the underlying facilities and the law of the foreign country prohibits them from acquiring an ownership interest. There is no rational basis for treating carriers which lease capacity from Comsat as facilities-based carriers, while treating carriers as resale carriers when they lease capacity from foreign carriers with legal monopolies over the ownership of international transmission facilities.

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<sup>18</sup> See Reevaluation of the Depreciated-Original-Cost-Standard in Setting Prices for Conveyances of Capital Interests in Overseas Communications Facilities Between or Among U.S. Carriers, 7 FCC Rcd 4561 (1992), recon., 8 FCC Rcd 4173 (1993).

<sup>19</sup> IDB continues to dispute the Commission's jurisdiction over foreign half-circuit providers and, more generally, the activities of foreign entities in foreign countries. E.g., "Response of IDB Communications Group, Inc. to Order and Notice of Apparent Liability for Forfeitures," NAL/Acct. Nos. 216E10001 & 216E10002, filed Feb. 26, 1993, at 9-19; Kneff Letter at page 11.

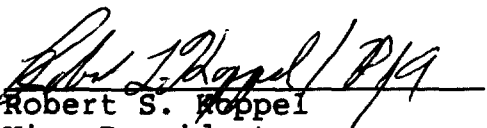
Conclusion

For the foregoing reasons, IDB petitions the Commission to initiate a rulemaking proceeding to adopt a uniform definition of facilities-based carrier as specified herein.

Respectfully submitted,

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October 29, 1993

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CERTIFICATE OF SERVICE

I, Danita Boonchaisri, hereby certify that I have caused a copy of the foregoing "Petition for Rulemaking" to be served on this 29th day of October, 1993, by U.S. mail, first class postage prepaid, upon the following:

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